

**BEFORE THE DIRECTOR OF THE  
WASHINGTON STATE DEPARTMENT OF AGRICULTURE**

**Proposal to Amend the Washington State Potato  
Commission Marketing Order (WAC 16-516)** )  
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**Findings, Conclusion, and  
FINAL DECISION**

**INTRODUCTION**

This document is a summary of the proposal to amend the Washington State Potato Commission Marketing Order. It contains background information on the need for the amendments, summarizes the process that has been followed, recaps the testimony at the public hearings, includes the Recommended Decision, recaps any statements filed with the Director, lists the Director's findings, includes the Director's Final Decision, and directs that the proposal be sent to a referendum of potato producers.

**BACKGROUND AND TECHNICAL REPORT**

On June 25, 2001, the U.S. Supreme Court issued a decision that called into question the ability of a Commodity Commission that is established and operated in the way most of Washington's Commodity Commissions are, to continue to engage in their usual activities and to require producers to pay assessments for generic advertising and promotion.

In the case of *United Foods, Inc. vs. United States*, the U.S. Supreme Court held that the mandatory assessment to fund a generic advertising program under the Mushroom Promotion, Research, and Consumer Information Act was a violation of the First Amendment because it required producers to pay for a message that they may not agree with. This decision was a shock to agriculture across the country as it had been assumed that the funding of generic promotions with mandatory assessments was settled four years earlier when the Court rejected a First Amendment challenge to a similar program in *Glickman vs. Wileman Bros. & Elliott, Inc.* In *Glickman vs. Wileman*, the Court rejected the First Amendment argument by saying that the advertising program in question was constitutional because it was part of a comprehensive scheme of regulation for the agricultural commodities.

While the 2001 Supreme Court decision only applied to the national Mushroom Council's advertising program, the Court's ruling raised questions about its potential impact on other state and federal marketing orders carrying out similar activities. Since the *United Foods* decision, a number of state and federal marketing orders around the country have been challenged on First Amendment grounds.

On March 31, 2003, the Federal District Court for the Eastern District of Washington (Judge Edward Shea) ruled that the mandatory Apple Commission assessments being collected under the version of RCW 15.24 in effect at that time, were unconstitutional because they violated the First Amendment. In essence, the Court ruled that certain apple growers were being required to pay for a message that they did not agree with.

The Apple Commission argued that it should not be subject to challenge under the First Amendment because the Commission is part of the state government and is entitled to "government speech" protections because it speaks the message of Washington government with regard to the positive qualities of Washington apples. But the Court disagreed.

In reviewing the court rulings, the Director of Agriculture and the current Commodity Commissions determined it would be in the best interest of Washington's agricultural producers and industries, our rural



communities, the state's economy, and the citizens of the state for Commodity Commissions to continue to exist in Washington. Based on the ruling against the Apple Commission, the Commodity Commission laws, RCW 15.65 and 15.66, needed to be amended.

Amendments to the Commodity Commission laws were modeled in response to the *United Foods* decision, the *Wileman* decision, the Apple Commission decision, and a decision involving the Federal Beef Act. The Federal Beef Act withstood a First Amendment challenge at the federal district court level because the court determined that the National Beef Board was speaking on behalf of the government when it promoted beef and beef products.

Government is free to speak without being subject to First Amendment challenges. Legislation was written in 2002 and 2003 to increase Department of Agriculture oversight of Commodity Commissions to strengthen the position that Washington's Commodity Commissions are entitled to government speech protection because they speak the message of Washington government with regard to their particular commodity, and to update the statutes. The Washington Legislature passed the amendments. The amendments to the Commodity Commission laws:

1. Clarify the intent of the legislature in authorizing and establishing Commodity Commissions and including them in the existing comprehensive regulatory scheme of agriculture.
2. Expand a Commodity Commission's potential purposes for existing (*such as to be involved in commodity related matters such as irrigation, processing, transportation, handling, or assist with pest control, etc.*).
3. Affirm that Washington Commodity Commissions have the authority, when there is sufficient oversight by the Director, to speak on behalf of Washington state government on commodity and commodity-related issues.
4. Provide for the ability to add additional Commission members (*for RCW 15.66 Commissions*) and the ability to have the Director of Agriculture appoint a majority of Commodity Commission board members.
5. Provide that the Director of Agriculture is a voting member of a Commission board.
6. Authorize the Director to review and approve a Commission's budget, projects, and programs.
7. Reiterate the importance of the Commission's role for the state of Washington.
8. Update and clarify various provisions of RCW 15.65 and 15.66, including those relating to issuing, amending, and terminating a Marketing Order and record keeping.
9. Authorize Commodity Commissions to take on additional powers and duties, if they choose to.

Some current Commodity Commission Marketing Orders no longer match the law they were adopted under. Therefore, the proposed amendments to the Washington State Potato Commission's Marketing Order will bring it in line with some of the changes to the Commodity Commission law. The proposed changes also add additional powers and duties that the Commission believes will be of benefit to the potato industry and Washington's rural communities. The proposed amendments will implement some of the changes passed in 2002 and 2003.

The recent United States Supreme Court decision in *Johanns vs. LMA* held that Commodity Commission speech activities qualify as government speech when the government exercises sufficient control over the content of the message in a Commission's advertising, marketing, and promotional activities and the government is ultimately responsible for the speech. The Potato Commission has chosen to eliminate its authority to engage in marketing, advertising, and promotional activities rather than authorize the Director of Agriculture to appoint a majority of board members after an advisory vote, as may be required for Commission activities to qualify as government speech. Instead, the Commission will continue to directly elect its board members and has decided to discontinue advertising, marketing and promotional activities.



At the public hearings held on August 17 and 18, 2005, Karen Bonaudi, Interim Executive Director for the Washington State Potato Commission, and Matt Harris, Director of Trade for the Washington State Potato Commission, presented the above background information in the form of a technical report. The Marketing Order amendments were explained and an opportunity for questions was provided.

The specific amendments to the Marketing Order are shown in Attachment "A".

### **PROCEDURAL STEPS**

This matter came before the Director of the Washington State Department of Agriculture (WSDA) pursuant to a petition filed by the Washington State Potato Commission requesting amendments to the Commission's Marketing Order (WAC 16-516) under the authority set forth in RCW 15.66, Washington State Agricultural Commodity Commissions Act.

On July 1, 2005, WSDA filed with the Washington State Code Reviser a Notice of Proposed Rulemaking (CR-102) requesting comments on the proposed Marketing Order amendments. The notice was published in the *Washington State Register* on July 20, 2005 (WSR #05-14-119).

Also, on July 22, 2005, a notice about the petition to amend the Marketing Order and notice of the public hearings on the proposed amendments was mailed to affected potato producers and interested parties. A Notice of Public Hearing was published in the *Columbia Basin Herald* on July 27 and 28, 2005 and the *Skagit Valley Herald* on July 28 and 29, 2005.

Pursuant to RCW 15.66.070, public hearings were held on August 17, 2005, beginning at 2:00 p.m. at the Big Bend Community College, Applied Technology Education Center, 7611 Bolling Street NE, Moses Lake, WA and August 18, 2005, beginning at 2:00 p.m. at the Best Western Cotton Tree Inn Convention Center, Lopez Room, 2300 Market Street, Mount Vernon, WA. Written comments on the proposal were accepted through the close of business (5:00 p.m.) on August 19, 2005.

### **TESTIMONY ON AMENDMENTS**

Under RCW 15.66.070 through 15.66.090 and RCW 34.05, Administrative Procedure Act, the Department collected testimony to determine whether affected producers or interested parties supported the proposed amendments to the Washington State Potato Commission Marketing Order.

Supporters of the proposed amendments provided the following comments:

- I believe the people who elect those on the Commission are better served when they come from the growers themselves and elected by the growers themselves versus being appointed by someone else who may not know the real issues or concerns of the growers. I strongly urge that the amendments be put to the vote of the Washington potato growers for adoption.
- Nine growers, individually, provided the following testimony: I support the proposed Marketing Order amendments because they benefit Washington state potato growers and the industry. I also support sending the proposed amendments to a referendum.

WSDA received no comments opposed to the proposed amendments.

A total of 9 individuals signed in at the hearings, providing oral testimony. WSDA received written testimony on the proposed amendments from 1 individual. A tally of the attendance at the hearings and the positions of those providing oral and written testimony on the proposed amendments are as follows:

- Of the 10 individuals who provided oral and/or written testimony:



10 supported the proposed amendments  
0 opposed the proposed amendments  
0 indicated no position

### **RECOMMENDED DECISION**

On September 8, 2005, the Director of WSDA issued the following Recommended Decision on the proposal:

The proposal to amend the Washington State Potato Commission Marketing Order (WAC 16-516) will be sent to a referendum pursuant to RCW 15.66.090. A ballot will be mailed to all potato producers on the list of affected producers.

If the referendum results approve the proposal, the proposal will be adopted on or about January 4, 2006 and the proposal will become effective February 4, 2006. If the referendum results defeat the proposal, no further action will be taken on the petition.

### **STATEMENTS FILED WITH THE DIRECTOR**

Under RCW 15.66.080, all interested parties had from September 13, 2005 until September 30, 2005 to file statements with the Director in support of or in opposition to the Recommended Decision. No additional statements were filed with the Director supporting or opposing the proposed Marketing Order amendments or the Recommended Decision.

### **FINDINGS AND CONCLUSION**

Based on the entire record, including facts, testimony, and evidence presented and received at the public hearings, any written comments received by WSDA, information relating to the 2002 and the 2003 amendments to chapter 15.66 RCW and matters of which the Director may take official notice under RCW 15.66.070, including the history and background of the Washington State Potato Commission and the decisions and settlement agreement in *Washington State Apple Advertising Commission v. Jack Nickell Orchards, LLC, et al.*, and the lack of additional statements received following the issuance of the Recommended Decision, the Director makes the following findings and conclusion:

1. The Washington State Potato Commission was formed under a Marketing Order approved by a vote of the affected producers pursuant to the Washington State Agricultural Commodity Commissions Act (Chapter 15.66 RCW) that became effective on July 23, 1956.
2. The Marketing Order establishing the Washington State Potato Commission (WAC 16-516) currently provides the following purposes:

***WAC 16-516-030 Marketing order purposes. (1) Advertising and sales promotion plans.***

*(a) The potato commission, subject to the provisions of the act, is hereby authorized to prepare plans, administer and conduct programs and expend monies for advertising and sales promotion for promoting the sale of potatoes for the purpose of maintaining existing markets or creating new and/or larger markets for potatoes grown in the state of Washington, including but not necessarily limited to the following:*

*(i) Increasing the sale and consumption of Washington produced potatoes through the use of the press, radio, television and all other advertising media.*

*(ii) Dealer service work, trade promotion, publicity, market development and expansion activities.*

*(iii) Prevention, modification, or elimination of trade barriers which restrict the free flow of potatoes produced in this state.*



*(iv) Presentation of facts to and negotiations with state, federal, or foreign governmental agencies on matters which effect the marketing of potatoes produced in this state, including cooperation with any agency or group in efforts to increase per capita consumption of potatoes, and such other activities and programs which are consistent with the objectives of this marketing order and the act.*

*(b) In carrying out any advertising and sales promotion plans or programs, the commission may engage or hire such advertising medias as may be necessary to accomplish the purposes of the act and this order, arrange for advertising space, display material and other advertising material, conduct dealer service work or may use any other methods consistent with the act and this marketing order which the commission considers appropriate in promoting or creating new and larger domestic or foreign markets for potatoes, or in maintaining existing markets.*

*(c) Programs and plans adopted by the commission under this marketing order shall be directed towards promoting the sale of potatoes without reference to any particular private brand or trade name and sales promotion and advertising programs so conducted shall not disparage the value, quality, sale or use of any other agricultural commodity or make use of any unwarranted or false claims on behalf of potatoes.*

*(2) Research.*

*(a) The potato commission, subject to the provisions of the act, is hereby authorized to carry on or cause to be carried on any necessary and proper marketing, production, processing or handling research or survey studies relating to potatoes and to expend monies for such purposes.*

*(b) Such research and survey studies may include, but shall not necessarily be limited to the following:*

*(i) Production problems, such as soil, seed, fertilizers, irrigation, insecticides and the like.*

*(ii) Developing objective maturity and quality factors for potatoes; more disease-resistant potatoes for marketing, and determining any special nutritive qualities of potatoes produced in Washington.*

*(iii) Improving techniques and methods of harvesting potatoes.*

*(iv) Developing and improving methods of processing potatoes and potato by-products for the purpose of increasing and expanding their use for food and industrial purposes.*

*(v) Improving packing and handling techniques which promote more efficient operation in the marketing and distribution of potatoes.*

*(vi) Investigating transportation rates and service costs, and if the commission after such investigation finds transportation rates and service costs are restricting the free flow of potatoes produced in this state the commission is authorized to institute proper action before the interstate commerce commission or such other agency or body deemed necessary to correct the situation.*

*(c) The commission, may, in addition to the activities enumerated above, carry on any other proper and necessary research and/or survey programs and activities consistent with, and subject to the limitations of the act. Such research and/or survey studies may include the collection of data and information relating to potatoes; the analysis of such data and information; the dissemination of such data, information and analysis; and such other investigation that falls within the scope of the marketing, producing, processing or handling of potatoes.*

*(3) Standards and grades.*

*(a) The potato commission, subject to the provisions of the act, is hereby authorized to define, establish and provide labeling requirements for improving standards and grades for potatoes, as provided in the act, not inconsistent with the horticultural laws of this state with respect to the same, and to expend monies for such purposes.*

*(b) The commission shall give reasonable written notice to all producers, handlers and persons directly affected by the labeling requirements issued pursuant to this section, not less than ten days prior to the effective time of such requirements.*

*(c) The commission shall be authorized to cooperate with state and federal agencies or departments responsible for revising and modernizing grades and standards and labeling of potatoes.*

*(d) Nothing in this section shall be construed as authorizing the commission to set minimum grades, sizes or maturity of potatoes which a producer may sell, offer for sale or ship.*



*(4) Unfair trade practices. The potato commission, subject to the provisions of the act, is hereby authorized to investigate and take necessary action to prevent unfair trade practices and to correct, where possible, trade practices which hinder marketing of Washington produced potatoes or potato products. Information acquired in such investigation shall be confidential and shall be released only to the extent necessary to effectuate the purposes of the act.*

*(5) Standards, grades, labels and trade practices. The provisions covering standards, grades, labels and trade practices shall apply with respect to potatoes marketed or sold within this state regardless of where produced.*

3. Pursuant to RCW 15.66, the Washington State Potato Commission filed a petition requesting amendments to the Commission's Marketing Order (WAC 16-516) on May 9, 2005.
4. Pursuant to RCW 15.66 and RCW 34.05, WSDA issued notices, held hearings, and collected testimony to determine whether affected producers or interested parties supported the proposed amendments to the Washington State Potato Commission Marketing Order.
5. The Marketing Order continues to provide for the direct election of the Commission's board members rather than authorizing a majority of board members to be appointed by the Director of the WSDA. The proposed amendments also eliminate the authority of the Commission to engage in advertising, marketing, and promotional activities. The Director finds that the Commission has chosen to stop engaging in these speech activities as its means of avoiding a First Amendment challenge. Instead, the Commission will respond to requests for public information and provide information and education to the potato industry as authorized in these proposed amendments.
6. Although only a small segment of the industry chose to attend or comment at the public hearings, the Director finds that the majority of those testifying or attending the hearings supported the proposed amendments to the Washington State Potato Commission Marketing Order.
7. The Director finds that even though the proposed amendments take some of the power to directly run the Commission away from the Commission's board by giving oversight responsibilities to the Director, the current state of the law and the challenges to Commodity Commissions make it necessary to do so, so that the Commission can continue to engage in the activities authorized in the revised Marketing Order.
8. The Director finds that it is appropriate to include the proposed amendments that are detailed in Attachment "A" in the proposal to amend the Marketing Order. They include:
  - Expanded policy statements clarifying that the Commission was established to benefit the industry and the citizens of the state of Washington (WAC 16-516-005).
  - A comprehensive list of the Marketing Order purposes and programs to benefit the potato industry and the state's citizens (WAC 16-516-006).
  - Elimination of the Commission's authority to engage in promotion and advertising activities (WAC 16-516-005 and 16-516-006).
  - Revised definitions (WAC 16-516-010).
  - Increasing the board membership from 14 to 15 members (WAC 16-516-020).
  - Adding the WSDA Director as a voting Commission member (WAC 16-516-020).
  - Decreasing the representative districts from 5 to 3 and redefining them with county designations (WAC 16-516-020).
  - Updates to the membership qualifications (WAC 16-516-020).
  - Clarifications to the nomination, election, and vacancy processes (WAC 16-516-020).
  - Increasing the oversight of the Commission's programs, activities, and budget by the WSDA (WAC 16-516-020).



- Adding additional powers and duties of the Commission, some of which include more power to contract, work cooperatively with other governments and assist with the investigation and control of exotic pests and diseases that affect potatoes, maintain lists, request and audit records, and hold intellectual property rights (WAC 16-516-020).
  - Updates to meeting and administrative procedures (WAC 16-516-020).
  - Removal of language referring to payment of assessments through the purchase of stamps (WAC 16-516-040).
  - Clarifications to the public disclosure exemption for affected producer information and records (WAC 16-516-050).
  - Repeal WAC 16-516-002, 16-516-030, and 16-516-070.
9. The Director finds that it is in the best interest of the potato industry and the public interest that the potato industry remains a viable agricultural industry in Washington State.
10. The Director concludes that the evidence and the record support a finding that the proposed amendments effectuate the declared policies and purposes of RCW 15.66 and WAC 16-516.

### **FINAL DECISION**

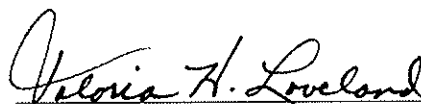
**NOW, THEREFORE**, based on the entire record in this matter, the Director enters the following Final Decision:

The proposal to amend the Washington State Potato Commission Marketing Order (WAC 16-516) will be sent to a referendum pursuant to RCW 15.66.090. A ballot will be mailed to all potato producers on the list of affected producers.

If the referendum results approve the proposal, the proposal will be adopted on or about January 4, 2006 and the proposal will become effective February 4, 2006. If the referendum results defeat the proposal, no further action will be taken on the petition.

Potato producers on the list of affected producers will be notified of the referendum results once the results are certified.

DATED this 14<sup>th</sup> day of October, 2005.



Valoria H. Loveland, Director  
Washington State Department of Agriculture